July 22, 2016

***Ex Parte* Notice**

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

**RE: Expanding Consumers' Video Navigation Choices, MB Docket No. 16-42**
**Commercial Availability of Navigation Devices, CS Docket No. 97-80**

Dear Ms. Dortch:

On Thursday, July 21, 2016 the undersigned and Jill Canfield with NTCA–The Rural Broadband Association ("NTCA"),[1] met with Robin Colwell, Chief of Staff and Senior Legal Advisor to Commissioner Michael O'Rielly. The parties discussed the Notice of Proposed Rulemaking ("NPRM") released by the Federal Communications Commission ("Commission") on February 18, 2016 (the "Information Flows Proposal") as well as an alternative approach put forth by a group of large multichannel video programming distributors ("MVPDs")[2] (the "Apps Alternative").

Consistent with prior advocacy,[3] NTCA reiterated its concern with the expected significant costs that small MVPDs will incur in connection with the proposals made in the NPRM. While these costs are difficult to quantify in specific terms because there is no standard (or standards) as yet for complying with the proposals and no technology actually exists today as a tested and proven method for MVPDs to provide the "Information Flows" as defined by the NPRM, it is clear that this proposal will involve a near total overhaul of existing MVPD networks, at the very least including software and hardware upgrades throughout their networks. Implementation of this

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1 NTCA represents nearly 900 rural rate-of-return regulated telecommunications providers ("RLECs"). All of NTCA's members are full service local exchange carriers and broadband providers, and many of its members provide wireless, cable, satellite, and long distance and other competitive services to their communities.

2 *Ex parte* letter from Paul Glist, on behalf of Vme TV, Revolt TV, TV One, NCTA, AT&T/DIRECTV, and Comcast to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. MB 16-42, CS Docket No. 97-80 (Jun. 16, 2016).

3 *See*, *ex parte* letter from Michael Romano on behalf of NTCA–The Rural Broadband Association to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. MB 16-42, CS Docket No. 97-80 (fil. Jul. 15, 2016).

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proposal would come at substantial cost to small MVPDs already struggling to continue operating in an already difficult MVPD market.

NTCA then noted that the Apps Alternative should not be viewed by the Commission as a "panacea" for resolving small MVPDs' concerns expressed in response to the NPRM. In particular, while it holds promise in terms of potentially resolving certain copyright, advertising, privacy, and other issues raised by the numerous parties objecting to the NPRM's proposals,[4] implementation of the alternative proposal or modified versions of it that may emerge could still come at substantial cost to small MVPDs. For one, small MVPDs would be required to create (or perhaps license) a content-delivery app, and while the app would according to the proposal be built consistent with the HTML5 standard, the use of an open and already existing standard does not reduce the costs that MVPDs will incur to create the app. In addition, MVPDs will be required to deploy an application programming interface necessary to enable their app to have access to the video content provided to the subscriber. Modifications to headends would also be required, as MVPD content would have to be transcoded into Internet Protocol format at every headend (even for current IPTV systems). Updated Digital Rights Management software would also be required.

NTCA further noted that while many larger MVPDs may have already begun to transition to an app-based delivery of their video content, many smaller MVPDs have not. Larger providers already have a great deal of the underlying infrastructure in place to deliver their content via apps (indeed they already do so), thus making this alternative in certain respects a continuation of larger carriers' existing business practices. To be clear, however, the Apps Alternative itself will require substantial investment even on the part of the largest providers to develop the apps and deploy additional IP-enabled infrastructure for implementation. For small MVPDs, however, the transition to app-based delivery of video content represents an even more significant overhaul of their networks and business practices, and thus this alternative would impose on these carriers a disproportionate cost burden.

With respect to the exact network modifications and the exact costs associated with implementation of the Apps Alternative, NTCA noted that the proposal is at this point seriously lacking in the detail necessary to enable a full accounting of such costs. Details such as whether MVPD apps would be licensable to other MVPDs pursuant to the proposal, as well as the terms and conditions of such an approach, have thus far not been made available to parties potentially charged with implementation of the alternative. In addition, while the Apps Alternative contains provisions related to enabling "integrated search," it is not clear whether the costs of enabling such a feature would fall on MVPDs or third-party device manufacturers. In short, the Commission cannot move forward in terms of implementation of the Apps Alternative based on a mere "one-pager" that does not provide sufficient detail for either MVPDs or the Commission itself to fully understand the network modification and others costs the proposal may require of parties charged with its implementation.

NTCA then stated that if any action is taken in this proceeding – in terms of either the Information Flows proposal or a version of the Apps Alternative – the Commission should adopt a permanent exemption for small MVPDs serving fewer than 1 million subscribers. Small

[4] *See generally*, Reply Comments of NTCA-The Rural Broadband Association, MB Docket No. 16-42 and CS Docket No. 97-80 (fil. May 23, 2016).

MVPDs already face significant challenges in the video business, particularly as content prices continue to strain their ability to remain viable. The cost of content continues to rise unabated by Commission action, and the additional costs of compliance with either the Information Flows proposal or the Apps Alternative may push a number of these providers to exit this already struggling line of business. This will reduce rather than enhance competition in the availability of video products and access to content.

In addition, as other stakeholders have noted, an exemption for small MVPDs serving fewer than 1 million subscribers would not undermine the Commission's goals for this proceeding. TIVO has correctly stated that, "the Commission could simply limit application of its proposed rules to MVPDs serving one million or fewer subscribers on the basis that such smaller MVPDs will have little ability to advance the statutory goal of assuring the availability of third-party navigation devices."[5] ACA has stated, too, that such an exemption "would still allow 100 percent of all MVPD subscribers to enjoy whatever benefits the proposal might provide with at least two different MVPDs in the market, and 93 percent of all MVPD subscribers with at least three different MVPDs in the market."[6] Thus, an exemption as proposed herein would still produce the competition in the device market that the Commission desires for all or nearly all MVPD subscribers nationwide while preserving small MVPDs' ability to remain a viable alternative for rural consumers.

Most importantly, an exemption would provide small MVPDs that choose to do so – and have the resources and technical expertise necessary to do so – the opportunity to move to an apps-based delivery of video content *based on their own timetable and based on their own business strategy and competitive needs*. A mandate in this proceeding, or even a deferred compliance date for small MVPDs, lumps every MVPD large and small into the same category, assuming that each provider has the same capital and technical resources. Even within the small MVPD community, there are significant differences among these carriers that must be taken into account as a matter of good public policy and Regulatory Flexibility Act analysis in reaching any decisions. An exemption for small MVPDs will account for the varied ability amongst small MVPDs, allowing some, despite an exemption being in place, to move to an app when they have the resources to do so and when they have made the determination that such an approach fits a business need while granting those not able to do so the ability to remain viable and continue to provide service using their existing facilities.

Finally, NTCA stated that the Apps Alternative as proposed by a group of larger MVPDs was meant to apply only to MVPDs serving more than 1 million subscribers. This makes sense in light of the fact that larger MVPDs have already, as noted above, begun a transition to app-based content delivery and thus have much more experience in doing so and some infrastructure in place to "ditch the box" once and for all. The same cannot be said of small MVPDs. This, and the fact that the details of the Apps Alternative are scant at best – thus preventing a complete assessment of the effect this proposal will have on small MVPDs – renders it unsuitable for these providers. A better approach would be a permanent exemption from any rules adopted in this

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[5] Comments of TIVO INC., MB Docket No. 16-42, CS Docket No. 97-80 (fil. Apr. 22, 2016) ("TIVO April 22 Comments"), pp. 32-34.

[6] Letter from Ross Lieberman, Senior Vice President of Regulatory Affairs, American Cable Association, to Marlene H. Dortch, Secretary, Federal Communications Commission (Feb. 11, 2016), p. 8.

proceeding – either based on the Information Flows or Apps Alternative or some variation of the two – that allows a market to develop for competitive navigation and/or associated third party devices while enabling small MVPDs to continue to provide service using their existing facilities or adopt alternatives based on consumer demand. At the very least, should the Commission move forward with the Apps Alternative or a version of such an approach, it must make additional detail and technical specifications available to small MVPDs to allow for a full consideration of their ability to comply.

Thank you for your attention to this correspondence. Pursuant to Section 1.1206 of the Commission's rules, a copy of this letter is being filed via ECFS.

Sincerely,

By: *<u>/s/ Brian J. Ford</u>*
Brian J. Ford
Senior Regulatory Counsel

cc: Robin Colwell